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In re Application of

CIRPUS et al.

Application No.: 10/511,621

PCT No.: PCT/EP03/04297

Int. Filing Date: 25 April 2003

Priority Date: 29 April 2002

Atty. Docket No.: 53262-20092.00

For: METHOD FOR THE PRODUCTION
OF POLYUNSATURATED FATTY
ACIDS IN PLANTS OR

DECISION ON PETITION
UNDER
37 CFR 1.181
&
37 CFR 1.137(b)

This decision is issued in response to applicant's "Request for Withdrawal of Holding of Abandonment or in the alternative, Petition to Revive" filed 19 May 2006, which is being treated as a Petition under 37 CFR 1.181 and 37 CFR 1.137(b).

BACKGROUND

On 25 April 2003, applicant filed international application no. PCT/EP03/04297 which claimed a priority date of 29 April 2002. A copy of the international application was communicated to the United States Patent and Trademark Office from the International Bureau on 13 November 2003. Pursuant to 37 CFR 1.495, the deadline for payment of the basic national fee in the United States was to expire 30 months from the priority date, 29 October 2004.

On 19 October 2004, applicant filed a transmittal for entry into the national stage in the United States, which accompanied by, inter alia: the requisite basic national fee as required by 35 U.S.C. 371(c)(1); a copy of the international application; a declaration of inventorship; an assignment; and a preliminary amendment.

On 23 February 2005, the law firm of Morrison & Foerster filed a "Request for Withdrawal as Attorney or Agent."

On 31 May 2005, the United States Designated/Elected Office (DO/EO/US) mailed a Notification to Comply with Requirements for Patent Applications Containing Nucleotide and/or Amino Acid Sequence Disclosures (Form PCT/DO/EO/922) indicating that a sequence listing in compliance with 37 CFR 1.821-1.825 had not been filed. The notification set a two-month time limit in which to respond.

On 03 June 2005, the law firm of Connolly Bove Lodge & Hutz submitted

"Transmittal of Power of Attorney" and a request to change the correspondence address.

On 08 May 2006, the United States Designated/Elected Office (DO/EO/US) mailed a Notification of Abandonment (Form PCT/DO/EO/909) indicating that the application was abandoned for failure to file a complete response to the Notification to Comply with Requirements for Patent Applications Containing Nucleotide and/or Amino Acid Sequence Disclosures (Form PCT/DO/EO/922) mailed 31 May 2005 within the time period set therein.

On 19 May 2006, applicant filed "Petition to Withdraw Holding of Abandonment and, in the alternative, Petition to Revive Unintentionally Abandoned Application" which included a submission in accordance with 37 CFR 1.821-1.825.

On 26 September 2006, the PALM Database indicated that a compliant computer readable form (CRF) had been submitted.

DISCUSSION

A. Request for Withdrawal of Attorney/Agent

Petitioner states in the present petition that "the lack of precessing of the change of Power of Attorney. . . has caused the application to now become abandoned." Section 402.06 of the Manual of Patent Examining Procedure (M.P.E.P.) states that the withdrawal of attorney is effective when approved rather than when received. Therefore, the USPTO mailed the Notification to Comply with Requirements for Patent Applications Containing Nucleotide and/or Amino Acid Sequence Disclosures (Form PCT/DO/EO/922) to the appropriate correspondence address. Further, the USPTO mailed the "Notification to Comply with Requirements for Patent Applications Containing Nucleotide and/or Amino Acid Sequence Disclosures (Form PCT/DO/EO/922) prior to the receiving the "Transmittal of Power of Attorney" filed by Connolly Bove Lodge & Hutz.

B. Petition to Withdraw Holding of Abandonment under 37 CFR 1.181

Petitioner states in their present petition that the Notification of Missing Requirements was not received by mail. With regards to applicants' request that the holding of abandonment be withdrawn, a proper showing in order to establish that papers were not received as set forth in the Official Gazette at 1156 OG 53 must include the following: (1) a statement by the practitioner that the Office action was not received by the practitioner; (2) a statement attesting that a search of the file jacket and docket records indicates that the Office action was not received; and (3) a copy of the docket record where the non-received Office action would have been entered had it been received (the docket record must also be referenced in practitioner's statement).

Regarding item (1) above, a practitioner from the law firm of Morrison & Foerster has not attested that the Office action was not received.

Concerning item (2) above, applicants have not provided a first hand statement from

a practitioner from the law firm of Morrison & Foerster attesting that a search of the file jacket and docket records indicates that the papers were not received.

With regard to item (3) above, petitioner has not provided a copy of the Morrison & Foerster's docket record where the notification mailed 31 May 2005 would have been entered had it been received or referenced such copies in the statement by practitioner. Specifically, applicant must provide a copy of counsel's docket records for 31 July 2005 (ie, the date on which the response was due) showing all applications for which a response was due on that date.

Thus, applicants have not provided the proper showing necessary to withdraw the holding of abandonment and the petition may not be properly granted.

C. Petition to Revive Under 37 CFR 1.137(b)

A petition under 37 CFR 1.137(b) requesting that the application be revived on the grounds of unintentional abandonment must be accompanied by (1) the required reply, (2) the petition fee required by law, (3) a statement that the "entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition was unintentional," and (4) any terminal disclaimer and fee required pursuant to 37 CFR 1.137(c).

With regard to Item (1), the proper response was the required sequence listing pursuant to 37 CFR 1.821-1.825.

As to Item (2), the appropriate petition fee of \$1500.00 as required by 37 CFR 1.17) will be charged to Deposit Account No. 03-2775.

With regard to Item (3), applicant's statement that "the abandonment was unintentionally" does not comply with 37 CFR 1.137(b)(3). However, the statement will be accepted and construed as meaning that "entire delay in filing the required reply from the due date for the reply until the filing of this petition under 37 CFR 1.137(b) was unintentional." If this is an incorrect interpretation in view of the rules, Petitioner is required to provide a statement to that effect.

As to Item (4), the terminal disclaimer is not required since this application was filed after 08 June 1995.

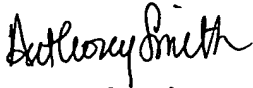
A review of the application file reveals that, with the filing of the present petition and accompanying papers, a proper response has been submitted and all of the requirements of 37 CFR 1.137(b) for revival have been satisfied and revival is therefore appropriate.

CONCLUSION

For the reasons above, the petition to withdraw the holding of abandonment under 37 CFR 1.181 is DISMISSED without prejudice.

The petition to revive under 37 CFR 1.137(b) is GRANTED.

This application is being returned to the United States/Elected Office for processing in accordance with this decision.



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